

A NG BEE LIN v. EKOWOOD INTERNATIONAL BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM

TEE GEOK HOCK JC

[ORIGINATING SUMMONS NO: BA-24NCVC-556-04-2021]

21 SEPTEMBER 2021

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LAND LAW: Caveat – Private caveats – Application for removal – Whether satisfied pre-requisites under s. 327(1) of National Land Code – Whether applicant person aggrieved by existence of private caveat – Rights obtained by way of consent judgments in nature of Tomlin orders incorporating settlement cum collateral agreements – Whether contractual agreement to use property as collateral for repayment of debt created registrable interest in land – Whether caveatable interests established – Whether mere personal interest – Whether private caveats wrongfully lodged – Whether removal justified

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The defendants commenced two suits in the subordinate courts against Timber Wolf (M) Sdn Bhd ('Timber Wolf') and Cheah Tit Boo, a director of Timber Wolf. The two suits were settled between the parties *vide* two consent judgments in the nature of Tomlinson orders which incorporated the settlement *cum* collateral agreements ('agreements'). However, the consent judgments did not specify the judgment sum as such. The terms of the agreement included clauses setting out the warranties and covenants of the guarantor, Cheah Tit Boo, including personal warranties and covenants as to the subject-property, the subject matter of the action herein. After the entry of the consent judgments and the signing of the agreements, neither the first defendant nor the second defendant lodged any caveat on the title of the subject-property until and after the plaintiff had bought the subject-property from their registered co-proprietors, Toh Wee Peng and Cheah Tit Boo. Following a drawdown of the housing loan and payment of the redemption money to redeem the property and obtain a discharge of charge, vacant possession of the subject-property was delivered by the vendors to the plaintiff. Thereafter, the plaintiff presented the transfer from discharge of charge and original issue document of title and other related documents for registration. However, the registrar of titles informed the plaintiff that the presentation was rejected because there was a private caveat lodged by the first defendant and another, by the second defendant. Upon the defendants' refusal or failure to withdraw the private caveats, the plaintiff filed the present originating summons, seeking the removal and/or cancellation of the defendants' private caveats and ancillary orders.

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Held (allowing plaintiff's application with costs):

- (1) The prerequisite for any application for the removal of a private caveat is provided under s. 327(1) of the National Land Code ('NLC') where the application must be made by a person or a body 'aggrieved' by the existence of the private caveat. The land search conducted prior to the drawdown of the loan to redeem the property did not disclose the defendants' caveats. Believing that the property was free from all encumbrances, the plaintiff bought and fully paid for the purchase price of the subject-property. In the circumstances, the plaintiff was an aggrieved person under s. 327(1) of the NLC and had the *locus standi* to file this application to remove the defendants' private caveats. (paras 21, 23, 24 & 26)
- (2) The agreements annexed to the consent judgments in the two subordinate courts cases were, by nature, Tomlin orders. Being in the nature of Tomlinson orders, the agreements did not form part of the terms of the consent judgments. The terms of the agreements were contractual agreements. Further, there was no evidence that Cheah Tit Boo had been authorised by the other co-proprietor Toh Wee Peng to use the subject-property as a collateral in favour of the defendants pursuant to the agreements. (paras 32, 33 & 35)
- (3) In order to constitute caveatable interest, there must be rights relating to land and not mere personal rights under a contract. The agreements did not confer upon the defendants any proprietary interest in the subject property. In contractually agreeing to use the subject-property as a collateral for the repayment of the settlement sums, the agreements by themselves did not create a registrable interest in land within the meaning of s. 323(1) of the NLC. Without the prior consent and authorisation of the other co-proprietor, a co-proprietor of the subject property cannot validly give another person the right of having collateral over the entirety of the subject property. In the circumstances, the defendants had no caveatable interest, hence, the removal of the defendants' private caveats, which was wrongfully lodged against the subject-property, was justified. (paras 37 & 39-42)
- (4) Shortly after signing the sale and purchase agreement for the subject-property and after having paid the 10% deposit, the plaintiff lodged a private caveat in respect of her interest in the subject-property. The plaintiff had thus acted diligently and expeditiously. The defendants did not lodge any caveat on the subject-property until months after the plaintiff had lodged the caveat in respect of the sale and purchase of the subject-property and also about 19 months after the signing of the agreements. Therefore, the plaintiff was a *bona fide* purchaser for value and without notice of any adverse claim. (paras 44-46)

- A (5) When the purchaser under a sale and purchase agreement of a piece of land has paid the purchase price in full to the vendor, the vendor henceforth holds the land as a bare trustee for the purchaser and the vendor no longer enjoys any beneficial interest to the land. With the financier loan drawdown to settle the final balance price on behalf of the plaintiff, the plaintiff had fully settled the purchase price and thereupon the registered proprietors Cheah Tit Boo and Toh Wee Peng became bare trustees, holding the subject-property on behalf of the plaintiff as the beneficial owner. (para 48)
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- C (6) In comparison with the plaintiff's position as the beneficial owner of the subject-property, the defendants' claims to the subject-property were personal claims against a co-proprietor Cheah Tit Boo for having the subject-property as a collateral for repayment of settlement sums. Even assuming that the defendants had any caveatable interest to render this case to be a contest between two competing caveatable interest, the rights of the claimant who has lodged his/her private caveat onto the title of the subject property first in point of time will prevail over the other claimant who lodged its private caveat later. Further, the plaintiff's interest as beneficial owners should prevail over the defendants' claims on contractual right to use the subject property as a collateral for the repayment of the settlement sums *vis-à-vis* Cheah Tit Boo. Hence, there was no serious issue to be tried and therefore, the plaintiff's originating summons ought to be allowed with costs. (paras 50-55)
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- F (7) The balance of convenience was in favour of removal of the defendants' caveats from the title of the subject-property. (para 56)

Case(s) referred to:

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC (*refd*)

Karuppiah Chettiar v. Subramaniam [1971] 1 LNS 43 FC (*refd*)

- G *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520 CA (*refd*)

Lysaght v. Edwards (1876) 2 Ch D 499 (*refd*)

Natsafe (M) Sdn Bhd v. Loi Teak Kuong [2005] 2 CLJ 285 HC (*fol*)

Temenggong Securities Ltd & Anor v. Registrar Of Titles, Johore & Ors [1974] 1 LNS 175 FC (*refd*)

Vanden Recycling Ltd v. Kras Recycling BV [2017] EWCA Civ 354 (*refd*)

- H *Watson v. Sadiq and Another* [2013] EWCA Civ 822 (*refd*)

Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 FC (*fol*)

Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA (*refd*)

Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals [1994] 3 CLJ 20 SC (*refd*)

- I **Legislation referred to:**

National Land Code, ss. 323(1), 327(1)

For the applicant - Kavetha Murugaya; M/s Zahir Jeya & Zainal

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For the respondents - Neeshanthiniy; M/s Tanes, Khoo & Paulraj

Reported by S Barathi

JUDGMENT

Tee Geok Hock JC:

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Introduction

[1] Litigants and advocates should be aware of the difference between a real consent judgment which incorporate therein the operative terms of the settlement and a Tomlinson order which is a bare consent judgment which cross-refers to an attached settlement agreement without incorporating the operative terms of settlement.

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[2] In our Torrens system of registration of titles and registrable interests, a person who has a contractual right which does not constitute a proprietary interest in the land has no caveatable interest in the land.

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Background Facts

[3] It all started with two suits in the subordinate courts brought in 2019 by each of the defendants herein against Timber Wolf (M) Sdn Bhd and Cheah Tit Boo, a director of Timber Wolf (M) Sdn Bhd. The Magistrate's Court suits were Kuala Lumpur Magistrate's Court Suit No. WA-A72NCvC-1945-04-2019 ("Suit No. 1945") by Ekowood International Bhd (the first defendant herein) against Timber Wolf (M) Sdn Bhd and Kuala Lumpur Suit No. WA-A52NCvC-207-03-2019 ("Suit No. 207") by Ekowood Malaysia Sdn Bhd against Timber Wolf (M) Sdn Bhd and Cheah Tit Boo.

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[4] The two subordinate court suits against Timber Wolf (M) Sdn Bhd were settled between the parties therein *vide* two consent judgments dated 10 May 2019 in the nature of Tomlin orders which incorporated the settlement cum collateral agreement dated 8 May 2019. Copies of the consent judgments in the nature of Tomlin orders which incorporated the settlement cum collateral agreement dated 8 May 2019 can be found in exh. "DCY1" to the defendants' affidavit-in-reply here (encl. 4). The consent judgments did not specify the judgment sum as such. Each of the consent judgments stipulated that (i) the parties ought to carry into effect the agreed terms of the consent judgment which mirrored the terms of the settlement cum collateral agreement dated 8 May 2019 attached thereto as Appendix A; (ii) parties were at liberty to apply to the court to enforce the said terms without having to file a fresh action; (iii) liberty to apply; and (iv) each party to bear its own costs.

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A [5] The first settlement cum collateral agreement dated 8 May 2019 was entered into between Ekowood International Bhd (the first defendant herein) of the first part, Timber Wolf (M) Sdn Bhd of the second part and Cheah Tit Boo of the third part. The second settlement cum collateral agreement dated 8 May 2019 was entered into between Ekowood Malaysia Sdn Bhd (the second defendant herein) of the first part, Timber Wolf (M) Sdn Bhd of the second part and Cheah Tit Boo of the third part.

[6] The terms of the first settlement cum collateral agreement dated 8 May 2019 included *inter alia* the following terms:

C Clause 1.1 The Debtor agrees to pay the Secured Party the total sum of RM46,611.25 over five (05) equal instalments, the instalment terms being as follows: one (01) instalment payment every six (06) months over a period of thirty (30) months from the date of this Agreement herein.

D Clause 1.2 The Debtor further covenants that the instalment(s) shall be paid in a timely manner by the 5th working day of every due month regardless of whether any material has been delivered or ordered for rework from the Secured Party.

E Clause 1.3 The Guarantor for valuable consideration, receipt of which is acknowledged, grants to the Secured Party a security interest in the following property of the Guarantor (hereinafter referred to as 'the Collateral') in the event of default of terms 1.1 and 1.2 above:

No. 17, Villa Damansara, Jalan Camar 4/25 PJU 5, Sek. 4, Kota Damansara, 47810 Petaling Jaya, Selangor

F to secure payment of the obligations of the Debtor to the Secured Party.

Clause 2.1.1 to 2.2.12 set out the warranties and covenants of the Guarantor (Cheah Tit Boo) which included his personal warranties and covenants as to the subject-property.

G [7] The terms of the second settlement cum collateral agreement dated 8 May 2019 included *inter alia* the following terms:

H Clause 1.1 The Debtor agrees to pay the Secured Party the total sum of RM190,338.12 over five (05) equal installments, the installment terms being as follows : one (01) installment payment every six (06) months over a period of thirty (30) months from the date of this Agreement therein.

I Clause 1.2 In the event the Debtor pays the Secured Party a higher monthly installment, the said sum due and owing, minus whatever higher amount paid, will be then due and payable in equal installments over the remaining installment period. Nevertheless, the minimum amount to be paid by the Debtor is as per clause 1.1 above.

- Clause 1.3 The Debtor further covenants that the installment(s) shall be paid in a timely manner by the 5th working day of every due month regardless of whether any material has been delivered or ordered for rework from the Secured Party. **A**
- Clause 1.4 Pursuant and in accordance to the Guarantee, the Guarantor for valuable consideration, receipt of which is acknowledged, grants to the Secured Party a security interest in the following property of the Guarantor (hereinafter referred to as 'the Collateral') in the event of default of terms 1.1, 1.2 and 1.3 above: **B**
- No. 17, Villa Damansara, Jalan Camar 4/25 PJU 5, Sek 4, Kota Damansara, 47810 Petaling Jaya, Selangor. **C**
- to secure payment of the obligations of the Debtor to the Secured Party.
- Clauses 2.1.1 to 2.2.12 set out the warranties and covenants of the guarantor (Cheah Tit Boo) which included personal warranties and covenants as to the subject-property. **D**
- Clauses 5.1 to 5.7 set out the parties' rights and obligations regarding the reworking of the goods.
- [8]** After the entry of the consent judgements in the nature of Tomlin orders and the signing of the settlement cum collateral agreements dated 8 May 2019, neither the first defendant nor the second defendant herein lodged any caveat on the title of the subject property until December 2020 and after the plaintiff herein had bought the subject property from their registered co-proprietors Toh Wee Peng and Cheah Tit Boo. **E**
- [9]** On 3 September 2020, the plaintiff's solicitors carried out a title search at the land office and the search showed the subject property to be free from encumbrance except for a legal charge in favour of OCBC Bank ("OCBC charge") (see para. 5 of the plaintiff's affidavit-in-support (encl. 2) and exh. "NG2" thereto). **F**
- [10]** On 23 September 2020 the plaintiff-purchaser signed the sale and purchase agreement with the registered co-proprietors Toh Wee Peng and Cheah Tit Boo (see para. 5 of the plaintiff's affidavit-in-support (encl. 2) and exh. "NG1" thereto). The purchase price for the subject property (a 2½ storey semi-detached house in Kota Damansara, Petaling Jaya) is RM2,300,000 (see cl. 1 of the sale and purchase agreement, encl. 2, p. 23 (pdf)). **G**
- [11]** Shortly after having signed the sale and purchase agreement and having paid the 10% deposit amounting to RM230,000, the plaintiff-purchaser lodged a private caveat on the title to the subject property. The plaintiff-purchaser's caveat was registered on 20 October 2020 (see exh. "NG4" of the plaintiff's affidavit-in-support (encl. 2)). **H**
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- A [12] Prompt steps were taken by the plaintiff-purchaser to apply for and obtain a housing loan from Public Bank. Prior to the drawdown of the Public Bank loan, the plaintiff-purchaser's solicitors on 2 December 2020 conducted another search on the title of the subject property and the search showed no caveat or adverse claim by the defendants or any other person
- B except for the OCBC charge (see para. 8 of the plaintiff's affidavit-in-support (encl. 2) and exh. "NG4" thereto).
- [13] On 29 December 2020, Public Bank made a drawdown of the housing loan and paid OCBC the redemption money of RM1,610,000 to redeem the subject property and to obtain a discharge of the OCBC charge (see para. 7
- C of the plaintiff's affidavit-in-support (encl. 2) and exh. "NG3" thereto).
- [14] Vacant possession of the subject property was delivered by the vendors to the plaintiff-purchaser on 31 December 2020 (see para. 16 of the plaintiff's affidavit-in-support (encl. 2) and exh. "NG3" thereto).
- D [15] Upon receipt of the redemption sum, OCBC Bank proceeded to execute the discharge of OCBC charge and by OCBC Bank's cover letter dated 21 January 2021 return the same together with the original issue document of title and a duplicate of the OCBC charge to the plaintiff-purchaser's solicitors charge (see para. 9 of the plaintiff's affidavit-in-support (encl. 2) and exh. "NG5" thereto). The discharge of OCBC charge was
- E stamped on 27 January 2021.
- [16] On 10 February 2021 the plaintiff-purchaser's solicitor presented the transfer form, discharge of OCBC charge, original issue document of title and other related documents for registration (see para. 10 of the plaintiff's affidavit-in-support (encl. 2) and exh. "NG6" thereto).
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- [17] By letter dated 24 February 2021 the Registrar of Titles from the Selangor Land and Mines Department informed the plaintiff-purchaser's solicitor that the presentation was rejected because there was a private caveat lodged by the first defendant on 10 December 2020 and another by the
- G second defendant on 2 February 2021 (see para. 11 of the plaintiff's affidavit-in-support (encl. 2) and exh. "NG7" thereto). Copies of private caveats lodged by the defendants are enclosed as exh. "NG8" of the plaintiff's affidavit-in-support (encl. 2).
- [18] After the defendants' refusal or failure to withdraw the private caveats,
- H the plaintiff-purchaser filed this originating summons on 27 April 2021 applying for the removal and/or cancellation of the defendants' private caveats and ancillary orders.
- [19] On 30 August 2021, this court allowed the plaintiff-purchaser's originating summons with costs and granted orders in terms of prayers (1) to
- I (4) of the originating summons (encl. 1).

[20] Being dissatisfied with the said decision, the defendants have filed an appeal against the said decision. A

Findings And Decision Of This Court

Whether The Plaintiff Is An Aggrieved Person

[21] The prerequisite for any application for the removal of a private caveat is provided under s. 327(1) of the National Land Code where the application must be made by a person or a body “aggrieved” by the existence of the private caveat. Section 327(1) of the National Land Code provides: B

327(1). Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just. C

[22] The Court of Appeal in *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin* [1997] 3 CLJ 854; [1997] 2 MLJ 487 held: D

... the word ‘aggrieved’ must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed. In this case, it was clear from the evidence given that the full purchase money for the land had been paid by the respondent to Long. The relevant transfer under the Code in respect of the land duly executed by Long in favour of the respondent was given to the respondent together with the issue document of title for the land. Long had done everything he could as registered proprietor to transfer or divest his entire interest in the land to the respondent. Thus, Long had thereby become a bare trustee holding the bare legal title to the land on trust for the respondent who had become the beneficial owner thereof. Further, the respondent had no reason to disbelieve Long whose assurance he had relied upon. Accordingly, the respondent was a *bona fide* purchaser for valuable consideration and therefore he was an aggrieved person entitled to make his application to the court under s. 327(1) of the Code for the removal of Goh’s caveat and Ho’s caveat (see pp 499F-G, I, 500D-E, 501H-I and 502A); *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45, *Ng Kheng Yeow v. Chiah Ah Foo & Ors* [1987] 2 MLJ 330, *Yeong Ah Chee v. Lee Chong Hai & Anor* [1994] 2 MLJ 614, *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 MLJ 12 and *A-G of Gambia v. Pierre Sarr N’Jie* [1961] AC 617 followed. E F G H

[23] In our present case, prior to the drawdown of the loan to redeem the said property the SPA solicitors conducted another land search on 2 December 2020 which did not disclose the defendants’ caveats. I

A [24] Based upon the land search conducted on 2 December 2020 and believing the property was free from all encumbrances, the financier (ie, Public Bank) was advised to release the full payment of the property which was made on 29 December 2020, whereupon the loan sum of RM1,610,000 only had been drawn down and disbursed towards redeeming the said property from OCBC Bank Bhd (the vendors chargee).

B [25] Thereafter, as the balance purchase price was fully paid upon disbursement of the loan by Public Bank Bhd pursuant to cl. 10 of the sale and purchase agreement (exh. “NG1” of the plaintiff’s affidavit-in-support), vacant possession was delivered to the plaintiff on 31 December 2020
C (exh. “NG9” of the plaintiff’s affidavit-in-support), whereupon renovation of the property was carried out by the plaintiff.

[26] In the circumstances, this court has found and held that the plaintiff is an aggrieved person under s. 327(1) of the National Land Code and has the *locus standi* to file this application to remove the defendants’ private caveats. It is also to be noted that if the plaintiff-purchaser, being the person who bought and fully paid for the purchase price of the subject property without prior notice of any adverse claim by the defendants, were to be held by the court as not being an “aggrieved person”, then one wonders who in the world would qualify as an “aggrieved person” to apply for removal of the defendants’ private caveats in the present case. This is in light of the reality that the vendors, having collected their full purchase price and delivered the vacant possession of the subject property, would most probably not be bothered to backtrack, while the banks as chargees and lenders would have the legal rights to recover their loan monies from the respective borrowers irrespective of whether the plaintiff-purchaser’s rights to the subject property can be secured by the plaintiff-purchaser may probably lack the commercial initiative to apply to the court for removal of caveats.

Principle And Procedure In An Application To Remove Caveat

G [27] In the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, the Court of Appeal laid down the principle and procedure of application to remove a private caveat as follows:

H In considering an application for the removal of a caveat, the procedure to be adopted should be a simple and summary one. At the first stage, the court will examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest. Once the court is satisfied that the caveator’s claim amounts in law to a caveatable interest, it must then go on to consider whether the claim discloses a serious question meriting a trial. After these two stages have been crossed, the court must decide where the balance of convenience lies.

I [28] Following the said decision, this court will deal with the three stages in the following paragraphs of this judgment.

First Stage: Whether The Defendants Have Caveatable Interest

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[29] Section 323 of the National Land Code provides the applications for entry of private caveats:

323. Applications for entry of private caveats

(1) The persons and bodies at whose instance a private caveat may be entered are:

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(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

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(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

[30] The principle and effect of Tomlinson order has been explained by the English Court of Appeal in the case of *Vanden Recycling Ltd v. Kras Recycling BV* [2017] EWCA Civ 354 in the following words:

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Thus a court will not make a consent order unless satisfied that it has power to do so, whilst it has no right to disapprove a Tomlin order and such an order can include matters that the court has no power to order. A breach of a consent order may be punishable as a contempt in appropriate circumstances, whilst *the remedy for breach of the scheduled terms of a Tomlin order is a claim for breach of contract. In terms of enforcement, the remedies in CPR Part 83 are available for breach of a consent order but not for breach of a Tomlin order.* Variation of a consent order is possible in the interests of justice, whilst rectification would be necessary to vary the contractual terms of a Tomlin order. Confidentiality for a consent order requires CPR 39.2 to be satisfied, whilst it can be contractually agreed for a Tomlin order. An appeal of a consent order is possible subject to the usual permission test, whilst there is no appeal from the agreed terms of a Tomlin order. These differences reflect the fact that a consent order is an order of the court whilst *the scheduled terms to a Tomlin order are a contractual agreement.* (emphasis added)

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[31] In the English case of *Watson v. Sadiq and Another* [2013] EWCA Civ 822, the court held as follows:

[44] Mr Isaac, for his part, relied upon the later decision of Ramsey J in *Community Care North East v. Durham CC* [2010] EWHC 959 (QB), [2010] 4 All ER 733, [2012] 1 WLR 338. That case concerned, as here, a Tomlin Order compromising proceedings as a whole. Ramsey J said this (after reference to *Ropac and Weston v. Dayman* [2006] EWCA Civ 1165, [2008] 1 BCLC 250, [2006] BPIR 1549):

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23 In this case the March 2009 Order contains, in the schedule, a binding contract between the parties compromising the proceedings. It is not a consent order made at an interlocutory stage by which a particular application is compromised on terms, including terms as to time for compliance. Nor is it a consent order

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- A which incorporates the binding contract as terms of the order. It is in the form of a Tomlin Order. In the commentary to CPR 40.6 at paragraph 40.6.2 of the White Book Volume 1 it is stated:
- Essentially, a Tomlin Order records terms of settlement agreed between the parties but those terms are not ordered by the court and are not enforceable as a judgment, at least not without a further order.*
- B The terms contained in the schedule are not something for approval by a judge. The judge will, however, approve the order itself. (emphasis added)
- C [32] In our present case, the settlement cum collateral agreements dated 8 May 2019 annexed to the consent judgments dated 10 May 2019 in the two cases in the subordinate courts are by nature Tomlin orders according to the meaning explained in the above-mentioned English court decisions. That the settlement cum collateral agreements are by nature Tomlinson orders is also confirmed and/or admitted by the defendants in para. 7 of the defendant's affidavit-in-reply (encl. 4).
- D [33] Being in the nature of Tomlinson orders, the settlement cum collateral agreements dated 8 May 2019 did not form part of the terms of the consent judgment. The terms of the settlement cum collateral agreements dated 8 May 2019 are contractual agreements.
- E [34] The purpose of the settlement cum collateral agreements dated 8 May 2019 was to enable the defendants/Ekowoods to recover the settlement sums of RM46,611.25 and RM190,338.12 under the said agreements with a company owned by Cheah Tit Boo, and Cheah Tit Boo contractually agreed to guarantee the repayment of the said settlement sums and to provide the subject property as a collateral in the event of default.
- F [35] There is no evidence that Cheah Tit Boo had been authorised by the other co-proprietor Toh Wee Peng to use the subject property as a collateral in favour of the defendants pursuant to the settlement cum collateral agreements. The defendants have not made allegation nor adduced any evidence that the other co-proprietor Toh Wee Peng had in any way authorised Cheah Tit Boo to make any promise or commitment regarding the subject property.
- G [36] The next question to be considered is whether a contractual promise by a co-proprietor to use the subject property as a collateral for repayment of debts would constitute a registrable interest in the subject property within the meaning of s. 323(1) of the National Land Code.
- H [37] In order to constitute caveatable interest, there must be rights relating to land and not mere personal rights under a contract: see the Federal Court's decision in *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26;
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[1984] 1 CLJ (Rep) 441; [1984] 2 MLJ 113 at p. 116. In that case, the appellant sold his land to the respondent and by cl. 4(a) of the deed of assignment it was agreed that *in lieu* of the appellant-vendor's agreement to waive MPI guarantee in connection with the purchaser's financier's legal charge upon the transfer ahead of the full payment of the purchase price, the appellant shall "lodge a private caveat against the said land ... to protect his interest". The Federal Court held that cl. 4(a) of the deed of assignment gave contractual right when the purchase price is not fully paid but did not constitute a caveatable interest.

[38] In *Natsafe (M) Sdn Bhd v. Loi Teak Kuong* [2005] 2 CLJ 285; [2005] 6 MLJ 454, Abdul Malik Ishak J (later JCA) held the plaintiff was not a party to the settlement agreement, as the parties involved in the settlement agreement were the shareholders of the plaintiff. That being the case, the defendant could not enforce the settlement agreement against the plaintiff. It was for this very reason that the settlement agreement did not confer any caveatable interest to the defendant (see para. 24). The court also held that the balance of convenience laid in favour of removing the private caveat. Moreover, there had been a delay of almost two years on the part of the defendant to commence proceedings timeously to enforce his legal rights, if any (see paras. 39 and 68). In *Natsafe* case (*supra*), the relevant parts of Abdul Malik Ishak J's judgment on this point are:

[33] The defendant's purpose in entering the private caveat is to protect his interest as a shareholder as well as his interest in the settlement agreement. The defendant argues that because the property forms part and parcel of the subject matter of the settlement agreement, his interest in the settlement agreement would be affected by the sale of the property. The crux of the settlement agreement is this. That it is for Loi Tek Huat and Loi Teak Ping to purchase the shares of the defendant and Wong Min Ngik in the plaintiff. The crucial parts of the settlement agreement can be seen in the following clauses:

(1) Clause 5.3 of the settlement agreement sets out the alternative mode of payment of the purchase price; and (2) Clause 5.5.1 stipulates that if the parties are unable to agree on the determination of the identity or the allocation of the property, the property shall be sold and the proceeds shall be distributed accordingly.

[34] It is quite apparent that the 'interest' acquired by the defendant is not in the property but rather the proceeds of sale of his shares in the plaintiff. From the clauses in the settlement agreement as reproduced earlier what is also apparent is this. That the property is only one of the various modes of payment of the 'share sale price'. It was even agreed that in the event the parties cannot determine the identity of the property, the property shall be sold and the proceeds therefrom will be distributed accordingly. Clearly therefore the defendant 'acquires' no proprietary interest whatsoever in any

- A property of the plaintiff. And so it can be surmised that the defendant's right arising from the settlement agreement is merely 'monetary' and it arises from the value of his shares in the plaintiff. For these varied reasons, it cannot be said that the defendant has a caveatable interest as he is neither claiming any right or interest to such title of the property. In *Kundang Lakes Country Club Bhd v. Garden Masters (M) Sdn Bhd* [1999] 2 MLJ 537, the Court of Appeal held that a mere debt cannot give rise to a caveatable interest. The Court of Appeal also referred to its own decision in *Trans-Summit Sdn Bhd v. Chun Nyook Lin (P)* [1996] 2 MLJ 247 where it rejected a joint-venture party's contention that they have a caveatable interest in the subject land of the joint venture project. In *Balakong Development Sdn Bhd v. Loo Kok Yuen & Anor* [1999] 2 MLJ 646, the High Court held that an agreement to sell shares does not confer any caveatable interest to the purchaser. (emphasis added)
- B
- C
- [39] In light of the Federal Court case of *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441; [1984] 2 MLJ 113 and Abdul Malik Ishak J's decision in *Natscape* case (*supra*), this court has found and held that the settlement cum collateral agreements did not confer upon the defendants any proprietary interest in the subject property. In contractually agreeing to use the subject property as a collateral for the repayment of the settlement sums, the settlement cum collateral agreements by themselves did not create a registrable interest in land within the meaning of s. 323(1) of the National Land Code.
- D
- E
- [40] This court also found that without the prior consent and authorisation of the other co-proprietor, a co-proprietor of the subject property cannot validly give another person the right of having collateral over the entirety of the subject property.
- F
- [41] In the circumstances, the defendants had no caveatable interest.
- [42] On this ground alone, it is sufficient to justify the removal of the defendants' private caveats which was wrongfully lodged against the subject property.
- G
- Second Stage: Whether The Claim Discloses A Serious Question Meriting A Trial*
- [43] This court proceeds to deal with the second stage involving the question of whether the claim discloses a serious question meriting a trial, as guided by the Court of Appeal in the case of *Luggage Distributors (supra)*. This second stage is an additional or alternative ground to the first stage, though the decision in the stage by itself suffices to remove the defendants' private caveats in our present case.
- H
- [44] From the facts stated in paras. 9 to 16 above, this court has found that the plaintiff/Ng Bee Lin is a *bona fide* purchaser for value and without notice of any adverse claim.
- I

[45] The plaintiff/Ng Bee Lin, shortly after signing the sale and purchase agreement for the subject property and after having paid the 10% deposit of RM230,000, lodged a private caveat in respect of her interest in the subject property. The plaintiff purchase acted diligently and expeditiously. A

[46] The defendants/Ekowoods did not lodge any caveat on the subject property until 10 December 2020 and 2 February 2021, months after the plaintiff/Ng Bee Lin had lodged the caveat in respect of the sale and purchase of the subject property and also about 19 months after the signing of the settlement cum collateral agreements dated 8 May 2019. B

[47] The plaintiff-purchaser, the purchaser's financier Public Bank and the legal charge OCBC Bank all acted *bona fide* in facilitating and completing the sale and purchase transaction and the loan transaction without notice of the defendants/Ekowoods' belated lodgement of private caveats. C

[48] With the Public Bank loan drawdown to settle the final balance price on behalf of the plaintiff/Ng Bee Lin, the plaintiff/Ng Bee Lin fully settled the purchase price of RM2,300,000 and thereupon the registered proprietors Cheah Tit Boo and Toh Wee Peng became bare trustees who are holding the subject property on behalf of the plaintiff/Ng Bee Lin as the beneficial owner. This is the principle decided by the Federal Court case of *Temenggong Securities Ltd & Anor v. Registrar Of Titles, Johore & Ors* [1974] 1 LNS 175; [1974] 2 MLJ 45: "(1) the vendors having parted with their interest in the lands to the appellants were bare trustees and had no interest in the land over which a valid caveat could be lodged"; "... As was said by Jessel MR in *Lysaght v. Edwards* (1876) 2 Ch D 499 at p. 506: ... the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession". The Federal Court in the case of *Karuppiah Chettiar v. Subramaniam* [1971] 1 LNS 43; [1971] 2 MLJ 116 held that "(1) in this case Mohamed Sharjudin having sold his entire interest in the land and received payment in full held the legal estate only as a bare trustee for the respondent, who was the equitable owner; (2) the appellant, as judgment creditor, could only take whatever interest the debtor had and in this case the debtor had parted with his whole interest in the land; (3) the learned judge in this case was right in setting aside the prohibitory order as there was nothing which could be put up for sale". The D E F G H I

- A findings of the beneficial interest or ownership over the property which was enunciated in *Temenggong Securities Ltd & Anor v. Registrar Of Titles Johore & Ors* [1974] 1 LNS 175; [1974] 2 MLJ 45 (FC) was reaffirmed by the then Supreme Court in *Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals* [1994] 3 CLJ 20; [1994] 2 MLJ 614 that when the purchaser under a sale
- B and purchase agreement of a piece of land has paid the purchase price in full to the vendor, the vendor henceforth holds the land as a bare trustee for the purchaser and the vendor no longer enjoys any beneficial interest to the land.
- [49] The principle of the vendor becoming bare trustee holding the property on behalf the purchaser upon the vendor's receipt of the full
- C purchase price is now cast in concrete as a result of the recent Federal Court decision in *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271 (FC) judgment delivered by Abang Iskandar FCJ (now CJSS).
- [50] In comparison with the plaintiff-purchaser's position as the beneficial owners of the subject property, the defendants/Ekowoods' claims to the
- D subject property are personal claims against a co-proprietor Cheat Tit Boo for having the subject property as a collateral for repayment of settlement sums in the event of a default in the settlement cum compromise agreements.
- [51] Even if it were assumed that the defendants/Ekowoods had any
- E caveatable interest, that would bring this case to be a contest between two competing caveatable interests. In a situation of competing caveatable interests, the rights of the claimant who has lodged his/her private caveat onto the title of the subject property first in point of time will prevail over the other claimant who lodged its private caveat later.
- [52] Even if it were assumed that the defendants/Ekowoods had any
- F caveatable interest and we were to consider the competing claims in terms of their natures and strengths, the plaintiff-purchaser's interest as beneficial owners (for whose behalf and benefit both the co-proprietors are holding the subject property as bare trustees) should prevail over the defendants/
- G Ekowoods' claims on contractual right to use the subject property as a collateral for repayment of settlement sums *vis-à-vis* Cheah Tit Boo (who acted without the authorisation of Toh Wee Peng).
- [53] In the circumstances of the present case, his court has found that even
- H at the second stage of considering the application for removal of caveat, there is no serious issue to be tried in the circumstances of the present case.
- [54] On this ground also, the plaintiff-purchaser's originating summons should also be allowed with costs.
- Third Stage: Balance Of Convenience*
- I [55] This court now proceeds to deal with the third stage involving the question of whether the balance of convenience lies in favour of removing the private caveat, as guided by the Court of Appeal in the case of *Luggage*

Distributors (supra). This third stage is an additional or alternative ground to the first stage or the second stage, though the decision in either the first stage or the second stage by itself suffices to remove the defendants' private caveats in the present case.

[56] In the entire circumstances of the present case the balance of convenience is in favour of removal of the defendants/Ekowoods' caveats from the title of the subject property. In making such conclusion, this court has considered the entire circumstances of the present case including those summarised below:

- (i) the defendants/Ekowoods did not act promptly or diligently in lodging a caveat shortly after the date of the consent judgment; A
- (ii) by the defendants/Ekowoods' said neglect of failure for some 19 months, the plaintiff/Ng Bee Lin was led into signing the sale and purchase agreement with the registered owners of the subject property and into paying the full purchase price of RM2,300,000 to the registered owners. The plaintiff/Ng Bee Lin acted as *bona fide* purchaser without notice of the defendants/Ekowoods' adverse claim of original amounts of RM46,611.25 and RM190,338.12; B
- (iii) the defendants/Ekowoods have not disclosed whether, and if so, how much repayments had been made by Timber Wolf (M) Sdn Bhd and Cheat Tit Boo; C
- (iv) the defendants/Ekowoods have not shown that there would be no likelihood of them recovering the settlement sums from Timber Wolf (M) Sdn Bhd and Cheat Tit Boo or either of the debtors; D
- (v) as there is no evidence of insolvency of Cheah Tit Boo and the total amounts claimed by the defendants/Ekowoods against him is not a very large amount, there is no proof of a real risk of the defendants/Ekowoods' inability to recover the balance settlement sums from Cheat Tit Boo without the benefit of the private caveat for prohibiting the transfer of the subject property; E
- (vi) in comparison, the plaintiff-purchaser is at certain risks of RM2,300,000 comprising partly her own money and partly Public Bank's loan disbursement if she is prevented by caveat from getting the transfer of the title of the subject property; F
- (vii) if the caveat is not removed, the plaintiff-purchaser would be liable to repay the bank loan to Public Bank without the benefit of getting the title of the subject property registered in her name; G
- (viii) worse, if Public Bank re-calls the entire housing loan due to the non-registration of the charge in favour of Public Bank, the plaintiff-purchaser would be faced with court suit by Public Bank with the resulting real risk of being declared a bankrupt for not repaying the entire amount of the housing loan in a lump sum; H

- A (ix) any continuance of the defendants/Ekowoods' private caveats for prolonged period would most probably lead to multiple claims and/or litigations between the plaintiff-purchaser, the Public Bank, the co-proprietors Cheah Tit Boo and Toh Wee Peng, and OCBC Bank (original charge). Innocent and *bona fide* parties ie, the plaintiff-purchaser, the Public Bank, the co-proprietor Toh Wee Peng, Public Bank and OCBC Bank (original charge) would be prejudiced and/or dragged into multiple litigations as a result of the defendants/Ekowoods' prolonged inaction and dilatoriness in failing to promptly lodge caveats shortly after the date of the settlement cum compromise agreements to protect their alleged claims; and
- B
- C (x) if the private caveats remain on the register, the sale and purchase agreement between the plaintiff and the purchaser cannot be fully completed because the property cannot be transferred to the purchaser. In such a situation, it would cause serious disruptions to the lives of the plaintiff-purchaser (who has moved in to the subject property) and also the co-proprietor Toh Wee Peng (who did not authorise the collateral over the subject property).
- D

[57] In this court's assessment at the third stage of the application for removal of caveat, this court also comes to the conclusion that on the balance of convenience the defendants/Ekowoods' private caveats should be removed.

E

Conclusion

[58] In conclusion, this court held on 30 August 2021 that the defendants/Ekowoods' private caveats on the subject property shall be removed, accordingly this court allowed the plaintiff-purchaser's originating summons with costs and granted orders in terms of prayers (1) to (4) of the originating summons (encl. 1).

F

[59] Costs of this suit were assessed at RM5,000 subject to allocator.

G

H

I